Guideline Sentencing Update

a publication of the Federal Judicial Center • available via Internet at http://www.fjc.gov • vol. 8, no. 7, June 25, 1996

Appellate Review

Departures

Supreme Court holds that decision to depart should be reviewed for abuse of discretion, not de novo; Court also states that courts cannot categorically reject a factor as basis for departure. In sentencing two police officers for civil rights violations in the Rodney King beating case, the district court departed downward eight offense levels. The court departed five levels under §5K2.10, concluding that "the victim's wrongful conduct contributed significantly to provoking the offense behavior." It also departed three levels for a combination of circumstances that, individually, would not warrant departure: Defendants were "particularly likely to be targets of abuse" in prison; defendants would suffer administrative sanctions and loss of employment; defendants had been "significantly burden[ed]" by successive state and federal prosecutions; and defendants were not "violent, dangerous, or likely to engage in future criminal conduct," so there was "no reason to impose a sentence that reflects a need to protect the public."

Reviewing the departure de novo, the Ninth Circuit reversed. The court held that the victim misconduct departure was invalid because misbehavior by a suspect in an excessive use of force case is taken into account in the statutes and Guidelines. The court rejected the other four factors as being accounted for in the Guidelines or inappropriate to consider at all. *See U.S. v. Koon*, 34 F.3d 1416, 1452–60 (9th Cir. 1994) [7 *GSU* #2].

The Supreme Court "granted certiorari to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines. The appellate court should not review the departure decision de novo, but instead should ask whether the sentencing court abused its discretion." The Court concluded that the Sentencing Reform Act and the Guidelines reduced but "did not eliminate all of the district court's discretion," and it adopted then-Chief Judge Breyer's opinion that "a sentencing court considering a departure should ask the following questions: '1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case? 2) Has the Commission forbidden departures based on those features? 3) If not, has the Commission encouraged departures based on those features? 4) If not, has the Commission discouraged departures based on those features?' *U.S. v. Rivera*, 994 F.2d 942, 949 (C.A.1 1993)."

"We agree with this summary. If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. . . . If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' *id*., at 949, decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'"

As for the standard of review on appeal, the Court agreed that the creation of sentencing guidelines showed "that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."

"A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court. . . . Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. . . . [A] district court's departure decision involves 'the consideration of unique factors that are "little susceptible . . . of useful generalization,"' . . . and as a consequence, de novo review is 'unlikely to establish clear guidelines for lower courts.'"

Guideline Sentencing Update is distributed periodically to inform judges and other judicial branch personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. *Update* refers to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission, but is not intended to report Commission policies or activities. Any views expressed are those of the Center staff who prepare the summaries.

To the government's argument that whether a particular factor is within the "heartland" is a question of law, the Court answered that the relevant inquiry is "whether the particular factor is within the heartland given all the facts of the case. For example, it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases. What the district court must determine is whether the misconduct which occurred in the particular instance suffices to make the case atypical. The answer is apt to vary depending on, for instance, the severity of the misconduct, its timing, and the disruption it causes. These considerations are factual matters."

"This does not mean that district courts do not confront questions of law in deciding whether to depart. In the present case, for example, the Government argues that the District Court relied on factors that may not be considered in any case. The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point. Little turns, however, on whether we label review of this particular question abuse of discretion or de novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction."

As to the specific grounds for departure in this case, the Supreme Court held that the victim's conduct and two of the four "combination" factors were valid reasons for departure. On the first, "[t]he Court of Appeals misinterpreted the heartland of §2H1.4 by concentrating on whether King's misconduct made this an unusual case of excessive force. . . . [T]he same Guideline range applies both to a Government official who assaults a citizen without provocation as well as instances like this where what begins as legitimate force becomes excessive. The District Court did not abuse its discretion in differentiating between the classes of cases, nor did it do so in concluding that unprovoked assaults constitute the relevant heartland. Victim misconduct is an encouraged ground for departure. A district court, without question, would have had discretion to conclude that victim misconduct could take an aggravated assault case outside the heartland."

On the other factors, the government argued that "each of the factors relied upon by the District Court [are] impermissible departure factors under all circumstances." The Court responded that "[t]hose arguments, however persuasive as a matter of sentencing policy, should be directed to the Commission. Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. Rather, 18 U.S.C. §3553(b) instructs a court that, in determining whether there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately considered by the Commission, it should consider 'only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.' The Guidelines, however, 'place essentially no limit on the number of potential factors that may warrant departure.' . . . The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it 'does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.' . . . Thus, for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission. . . . We conclude, then, that a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline."

The Court then concluded that two of the factors could not be used for departure in this case. "[T]he District Court abused its discretion by considering petitioners' career loss because the factor, as it exists in these circumstances, cannot take the case out of the heartland of 1992 USSG §2H1.4. . . . Although cognizant of the deference owed to the district court, we must conclude it is not unusual for a public official who is convicted of using his governmental authority to violate a person's rights to lose his or her job and to be barred from future work in that field." (Note: Justice Stevens dissented on this point.) The Court also found that "the low likelihood of petitioners' recidivism was not an appropriate basis for departure. Petitioners were first-time offenders and so were classified in Criminal History Category I, . . . [which] 'is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.'"

"The two remaining factors are susceptibility to abuse in prison and successive prosecutions. The District Court did not abuse its discretion in considering these factors. The Court of Appeals did not dispute, and neither do we, the District Court's finding that '[t]he extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse' . . . . The District Court's conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts."

"As for petitioners' successive prosecutions, it is true that consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal

system in some instances. Successive state and federal prosecutions do not violate the Double Jeopardy Clause. . . . Nonetheless, the District Court did not abuse its discretion in determining that a 'federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants.' . . . The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court." (Justices Souter, Ginsburg, and Breyer dissented on these last two points.)

The Court remanded for the district court to reconsider the extent of departure in light of this opinion. The Court then added: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the U.S. District Judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt."

Koon v. U.S., No. 94-1664 (U.S. June 13, 1996) (Kennedy, J.).

See *Outline* at VI.C.3 and 4.b, X.A.1

Departures

Substantial Assistance

Supreme Court holds that separate motion under 18 U.S.C. §3553(e) is required for substantial assistance departure below mandatory minimum. Defendant was charged with cocaine offenses and faced a ten-year mandatory minimum sentence. He pled guilty under a plea agreement that stated the government would move under §5K1.1 for a departure from the applicable guideline range if he cooperated, but there was no agreement to move under 18 U.S.C. §3553(e) for departure below the mandatory minimum. The government did make a motion "pursuant to §5K1.1" for departure from the guideline sentence, which was 135–168 months, but did not mention §3553(e) or the mandatory minimum. The district court granted the motion and imposed a ten-year term after ruling that, in the absence of a §3553(e) motion, it could not depart below the mandatory minimum.

Defendant appealed, but the Third Circuit affirmed, holding that "a motion under USSG §5K1.1 unaccompanied by a motion under 18 U.S.C. §3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum." *U.S. v. Melendez,* 55 F.3d 130, 135–36 (3d Cir. 1995) [7 *GSU* #10]. The Eighth Circuit agrees, but four circuits have held that a separate §3553(e) motion is not required. See cases in *Outline* at VI.F.3.

The Supreme Court granted certiorari to resolve the circuit split and concluded that a §5K1.1 motion "does not authorize a departure below a lower statutory minimum." The Court rejected petitioner's argument that §5K1.1 creates "a 'unitary' motion system," agreeing with the government that "nothing in §3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable Guidelines range. Nor does anything in §3553(e) or [28 U.S.C.] §994(n) suggest that the Commission itself may dispense with §3553(e)'s motion requirement, or alternatively, 'deem' a motion requesting or authorizing different action—such as a departure below the Guidelines minimum—to be a motion authorizing the district court to depart below the statutory minimum."

"Moreover, we do not read §5K1.1 as attempting to exercise this nonexistent authority. Section 5K1.1 says: 'Upon motion of the government stating that the defendant has provided substantial assistance . . . the court may depart from the Guidelines,' while its Application Note 1 says: 'Under circumstances set forth in 18 U.S.C. §3553(e) and 28 U.S.C. §994(n) . . . substantial assistance . . . may justify a sentence below a statutorily required minimum sentence,' §5K1.1, comment., n.1. One of the circumstances set forth in §3553(e) is, as we have explained previously, that the Government has authorized the court to impose a sentence below the statutory minimum."

The Court also found unpersuasive petitioner's arguments "that §3553(e) requires a sentence below the statutory minimum to be imposed in 'accordance' with the Guidelines," that §994(n) required the Commission to draft a provision covering reduction below a mandatory minimum for substantial assistance, and that the language of the policy statement and various application notes indicate that §5K1.1 authorizes departure from the mandatory minimum. "We agree with the Government that the relevant parts of the statutes merely charge the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum. Congress did not charge the Commission with 'implementing' §3553(e)'s Government motion requirement, beyond adopting provisions constraining the district court's discretion regarding the particular sentence selected.

"Although the various relevant Guidelines provisions invoked by the parties could certainly be clearer, we also believe that the Government's interpretation of the current provisions is the better one. Section 5K1.1(a) may guide the district court when it selects a sentence below the statutory minimum, as well when it selects a sentence below the Guidelines range. The Commission has not, however, improperly attempted to dispense with or modify the requirement for a departure below the statutory minimum spelled out in §3553(e)—that of a Government motion requesting or authorizing a departure below the statutory minimum."

The Court left one issue unresolved. "Although the Government contends correctly that the Commission does not have authority to 'deem' a Government motion that does not authorize a departure below the statutory minimum to be one that does authorize such a departure, the Government apparently reads §994(n) to permit the Commission to construct a unitary motion system by adjusting the requirements for a departure below the Guidelines minimum—that is, by providing that the district court may depart below the Guidelines range only when the Government is willing to authorize the court to depart below the statutory minimum, if the court finds that to be appropriate. . . . We need not decide whether the Commission could create this second type of unitary motion system, for two reasons. First, even if the Commission had done so, that would not help petitioner, since the Government has not authorized a departure below the statutory minimum here. Second, we agree with the Government that the Commission has not adopted this type of unitary motion system." (Note: Justices Breyer and O'Connor dissented on this issue.)

Melendez v. U.S., No. 95-5661 (U.S. June 17, 1996) (Thomas, J.).

See *Outline* at VI.F.3.

Determining the Sentence

Fines

Fourth Circuit holds that district courts may not delegate final decisions concerning amount of fine and schedule of payments. Defendant was ordered to pay a $3,000 fine and $50 in restitution. Payments toward those amounts were to be made at such times and in such amounts as the Bureau of Prisons and/or the Probation Office may direct. In another case after this sentencing, the Fourth Circuit held that district courts could not delegate to probation officers final decisions about the amount and schedule of restitution payments. *See U.S. v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995) [7 *GSU* #8].

The appellate court in this case concluded that the reasoning of *Johnson* "equally applies when the delegation involves a fine. Title 18 U.S.C.A. §3572(d) (West Supp.1995) provides that a 'person sentenced to pay a fine or other monetary penalty shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments.' This section as well as §3663(f)(1), setting forth the district court's statutory duty to fix the terms of restitution, both impose upon the 'court' the responsibility for determining installment payments. Like restitution, the statutory duty imposed upon district courts to fix the terms of a fine must be read as exclusive because the imposition of a sentence, including the terms of probation or supervised release, is a core judicial function. Accordingly, we hold a district court may not delegate its authority to set the amount and timing of fine payments to the Bureau of Prisons or the probation officer. *See U.S. v. Kassar*, 47 F.3d 562, 568 (2d Cir. 1995) (holding that a district court may not delegate its responsibility under 18 U.S.C.A. §3572 for determining installment payments with regard to a fine)."

U.S. v. Miller, 77 F.3d 71, 77–78 (4th Cir. 1996). Note: 18 U.S.C. §3572(d) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (effective Apr. 24, 1996), and new subsection (2) states: "If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made."

See *Outline* at V.D.1, generally at V.E.1.

Guideline Sentencing Update, vol. 8, no. 7, June 25, 1996
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003